

# INDEX

	Page
Opinions below.....	2
Jurisdiction.....	2
Questions presented.....	3
Statement.....	3
Reasons for granting the writ.....	7
Conclusion.....	14
Appendix.....	15

## CITATIONS

### Cases:

<i>Bowman v. Loperena</i> , 311 U. S. 262.....	8
<i>Brinckerhoff v. Wemple</i> , 1 Wend. 470 (N. Y.).....	10
<i>Catlin v. United States</i> , 324 U. S. 229.....	9
<i>Cherokee Nation v. United States</i> , 270 U. S. 476.....	13
<i>Chickasaw Nation v. United States</i> , 95 C. Cls. 192, reversed, 318 U. S. 423.....	12
<i>Chickasaw Nation v. United States and the Choctaw Nation</i> , No. 169, present Term.....	1
<i>Choctaw Nation v. United States</i> , 21 C. Cls. 59, affirmed in part, 119 U. S. 1.....	5, 9
<i>Choctaw Nation v. United States</i> , 83 C. Cls. 140.....	9
<i>Choctaw Nation v. United States</i> , 318 U. S. 423.....	7, 9
<i>Colgate v. United States</i> , 280 U. S. 43.....	7
<i>Coutant v. Catlin</i> , 2 Sand. Ch. 485 (N. Y.).....	10
<i>Harris v. Howes</i> , 75 Me. 436.....	10
<i>Kingman v. Western Manufacturing Co.</i> , 170 U. S. 675.....	8
<i>Legg v. Legg</i> , 34 Wash. 132.....	10
<i>McAllister v. Reel</i> , 53 Mo. App. 81.....	10
<i>Meda v. Lawton</i> , 214 Cal. 588.....	8
<i>United States v. Ellicott</i> , 223 U. S. 524.....	8
<i>United States v. Seminole Nation</i> , 299 U. S. 417.....	8
<i>Watson v. Union Gravel Co.</i> , 50 Mo. App. 635.....	9
<i>Zimmern v. United States</i> , 298 U. S. 167.....	8

### Statutes and treaty:

Act of March 3, 1875, 18 Stat. 476.....	4
Act of March 3, 1881, 21 Stat. 504.....	5
Act of April 26, 1906, 34 Stat. 137, Section 18.....	13
Act of June 7, 1924, 43 Stat. 537:	
Sec. 4.....	7
Sec. 6.....	5, 12
Act of February 13, 1925, as amended, Secs. 3(b) and 8..	7
R. S. sec. 1091, 28 U. S. C. sec. 284.....	13
Treaty of January 20, 1825, 7 Stat. 234.....	4

## II

Miscellaneous:	Page
Report of Commissioner of Indian Affairs (1888), pp. viii-ix.	13
Report of Commissioner of Indian Affairs (1906), p. 450---	13
Report of Commissioner of Indian Affairs (1920), p. 200---	13
Restatement of the Law on Restitution (1939), sec. 125---	10
Tiffany on Real Property (2nd ed., 1920), sec. 199, pp. 678- 679-----	10

# In the Supreme Court of the United States

OCTOBER TERM, 1945

---

No. 337

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

THE CHICKASAW NATION AND THE CHOCTAW  
NATION

---

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS

---

On June 25, 1945, the Chickasaw Nation filed a petition for a writ of certiorari in *Chickasaw Nation v. United States and the Choctaw Nation*, No. 169, seeking review of those parts of the judgment rendered in said case by the Court of Claims holding that the value of the land taken was \$.50 per acre, that interest was due only from 1906 rather than from the date of taking in 1875, that the counterclaim of \$57,500 by the United States should be allowed, and that the United States was entitled to gratuity offsets, such offsets not being needed in said case. A brief in opposition to the foregoing petition is being filed by the Government.

The Acting Solicitor General on behalf of the United States prays in the event the Court grants the petition for writ of certiorari in No. 169, but only in that event, that a cross-writ of certiorari be directed to the Court of Claims to review those portions of its judgment in this case which hold that the United States is under any liability to make payment to the Chickasaw Nation for its one-fourth interest in the land involved, and that the United States should pay interest on the amount awarded from February 19, 1906, to the date of judgment. The certified transcript of record filed in No. 169 includes those portions of the record upon which this cross-petition is based.

#### OPINIONS BELOW

The opinion rendered by the Court of Claims on May 5, 1941, is reported in 94 C. Cls. 215.<sup>1</sup> The court's opinion of January 8, 1945 (R. 33-36) is not yet reported.

#### JURISDICTION

The jurisdiction of the Court of Claims was invoked under the Act of June 7, 1924, 43 Stat. 537, as amended by the Joint Resolution of February 19, 1929, 45 Stat. 1229. The judgment sought to be reviewed was entered on January 8,

---

<sup>1</sup> Pertinent parts of this opinion are set forth in the Appendix, *infra*, pp. 15-21. References thereto will be indicated by (App.), while references to the printed record in No. 169 will be indicated by (R.).

1945 (R. 42). A motion by the Chickasaw Nation for a new trial was overruled on April 2, 1945 (R. 42). On June 27, 1945, the time within which to file a cross-petition for writ of certiorari was extended by Mr. Justice Rutledge to and including August 31, 1945. The jurisdiction of this Court is invoked under Section 4 of the Act of June 7, 1924, 43 Stat. 537, and Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

#### QUESTIONS PRESENTED

1. Whether this cross-petition is timely filed.
2. Whether the Choctaw Nation, rather than the United States, should make payment to the Chickasaw Nation for its one-fourth interest in the lands involved.
3. Whether, if the United States is deemed liable to the Chickasaw Nation, interest is allowable on the amount awarded, and, if so, whether the United States is entitled to recover that interest from the Choctaw Nation.

#### STATEMENT

This is a suit by the Chickasaw Nation to recover compensation for its one-fourth interest in the lands taken by the United States (R. 1-9). A full statement of the facts and statutes involved and of the proceedings in the Court of Claims is set forth in the brief of the United States in opposition, filed in No. 169, to which

reference is made. The facts and proceedings material for a consideration of this cross-petition are as follows:

In 1820 the United States ceded to the Choctaw Nation a tract of land west of the Mississippi River, lying between the Arkansas and Red Rivers, in exchange for a cession by the Choctaws of a portion of their lands in the State of Mississippi. 7 Stat. 210. By the Treaty of January 20, 1825, 7 Stat. 234, the Choctaw Nation receded to the United States the eastern portion of the tract so that the new eastern boundary was a line "beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence, due south, to Red River." When the eastern boundary was surveyed and marked later in 1825, the line erroneously veered to the west, thus excluding from the Choctaw country a triangular tract of 136,204.02 acres, which is the subject of this suit. (R. 37-38.) The error in the survey was not discovered until a new survey was begun in 1857, but at that time the old, incorrect line was retraced and remarked (R. 39-40). A dispute then arose as to the lands here involved, and by the Act of March 3, 1875, 18 Stat. 476, Congress declared the 1825 line to be the permanent boundary between the State of Arkansas and the Indian country (R. 40). Meanwhile, in 1837 the Chickasaw Nation had acquired a one-fourth interest in the Choctaw lands (R. 38-39).

Pursuant to the Jurisdictional Act of March 3, 1881, 21 Stat. 504, the Choctaws instituted a suit in the Court of Claims for an adjudication of their claims against the United States, including a claim for compensation for the taking of the same lands here involved. The court found the value of the lands to be \$68,102 and awarded that amount to the Choctaws. *Choctaw Nation v. United States*, 21 C. Cls. 59, 72, 110, affirmed on this point, 119 U. S. 1, 41. The award was paid to the Choctaws on June 29, 1888. Thereafter the Chickasaws, since they owned a one-fourth interest in the lands, demanded of the Choctaws one-fourth of the amount recovered. (R. 41.) After much discussion the governments of the Choctaw and Chickasaw Nations in 1905 arrived at an agreement by which the Choctaws were to pay to the Chickasaws one-fourth of the recovery, less the costs of collecting, or a net sum of \$16,003.97 (R. 41-42). This agreement was approved by the President of the United States on February 19, 1906. However, the Choctaw Nation never paid the agreed amount to the Chickasaw Nation. (R. 42.)

Under these circumstances, when the Chickasaw Nation filed the present suit to recover compensation for its interest in the same lands for which the United States had already paid the Choctaws in full, the United States impleaded the Choctaws pursuant to Section 6 of the Jurisdictional Act

(43 Stat. 537, 538) under which this suit was instituted, and filed a cross-complaint alleging that any judgment to which the Chickasaws might be entitled should be rendered against the Choctaws (R. 12-13). The Government also filed an answer denying any liability toward the Chickasaws and praying that (1) the petition be dismissed, (2) any judgment in favor of the Chickasaws be entered against the Choctaws, or (3) if judgment be entered against the United States, it have judgment for a like amount over against the Choctaws (R. 9-12). In their answer to the cross-complaint the Choctaws denied any liability toward either party (R. 14-15).

The Court of Claims found that the value of the lands in question was \$68,102 as of March 3, 1875, and held that the Chickasaws were entitled to recover from the United States one-fourth of such value, or \$17,025.50, with interest at 5 per cent per annum from February 19, 1906, the date of approval of the Choctaw-Chickasaw agreement (R. 26, 33; App. 17-18). However, the amount of this recovery was more than offset by the allowance of a government counterclaim against the Chickasaws, so that their suit was dismissed (R. 33, 42). On its cross-complaint the United States was awarded judgment for \$16,003.97 without interest against the Choctaws (R. 33, 42; App. 20-21).

The judgment of the Court of Claims was entered on January 8, 1945, and the Chickasaws filed

a motion for new trial, which was denied on April 2, 1945 (R. 42). On June 25, 1945, the Chickasaws filed a petition for a writ of certiorari (No. 169), and on June 27, 1945, Mr. Justice Rutledge extended to August 31, 1945, the time within which to file this cross-petition, the order being made "provided the statutory time has not already expired."

#### REASONS FOR GRANTING THE WRIT

1. Section 4 of the Jurisdictional Act here involved, 43 Stat. 537, 538, provides—

That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

This statute has been construed to authorize a writ of certiorari from this Court to the Court of Claims. *Choctaw Nation v. United States*, 318 U. S. 423; see also *Colgate v. United States*, 280 U. S. 43. Section 4 consequently assimilates the provisions of Section 3 (b) and Section 8 of the Act of February 13, 1925, as amended, with the attendant three-months' time limit for applications for certiorari.

The order of June 27, 1945, extending the time within which to file this cross-petition, was made "providing the statutory time has not already expired". This proviso raises the ques-

tion whether, in the absence of a motion for a new trial by the United States, the Government's time for filing a petition or obtaining an extension therefor expired on April 8, 1945 (three months after judgment), or on July 2, 1945 (three months after denial of the Chickasaws' motion for a new trial). There is no doubt that the Chickasaws had until July 2, 1945, to file their petition (*United States v. Seminole Nation*, 299 U. S. 417, 421), and we submit that the United States should be entitled to the same length of time within which to file its petition or obtain an extension. It is well-settled that the filing of a motion for a new trial suspends the finality of a judgment and tolls the running of the statutory period until the disposition of the motion. *Bowman v. Loperena*, 311 U. S. 262, 266; *United States v. Ellicott*, 223 U. S. 524, 539; *Kingman v. Western Manufacturing Co.*, 170 U. S. 675, 678, 680-681. Moreover, the finality of the judgment being in suspense until confirmation or modification by the court, it is immaterial that a petitioner did not himself move for a new trial. Cf. *Zimmern v. United States*, 298 U. S. 167, 168-170; *Meda v. Lawton*, 214 Cal. 588. If the rule were otherwise, a party not seeking relief in the trial court, in order to protect his interests, would be compelled to file one petition within three months after judgment and then file another petition in the event the judgment was

modified as a result of the new trial motion, thus bringing his case to the appellate court in fragments, a result contrary to appellate practice. *Catlin v. United States*, 324 U. S. 229, 233-234. If a new trial were granted, the situation would be much worse, with the appellate court being asked to give relief to one party while the trial court was considering the entire case. Hence, the order extending time having been entered within three months after the denial of a new trial, it is clear that there is no jurisdictional defect in the granting of the extension.

2. At the time of taking by the United States in 1875, the lands in question were owned in common by the Choctaw and Chickasaw Nations, the Choctaws owning three-fourths and the Chickasaws the remainder (R. 7, 38-39, 41). See *Choctaw Nation v. United States*, 318 U. S. 423, 424; *Choctaw Nation v. United States*, 83 C. Cls. 140. Inasmuch as the Chickasaws had at the time no right to bring suit against the United States, the act of the Choctaws in claiming compensation (*Choctaw Nation v. United States*, 21 C. Cls. 59) for the taking of these lands must be regarded as having been for the benefit of their co-tenants, the Chickasaws. Therefore, the United States, having made payment in full to the Choctaws in 1888 (R. 41), is under no liability to make another payment to the Chickasaws for the same lands. *Watson v. Union Gravel Co.*, 50 Mo. App. 635;

Tiffany on Real Property (2nd ed., 1920), sec. 199, pp. 678-679. Rather, the Choctaws, having received a proportionate share of the amount recovered in trust for the Chickasaws, are under a duty to account therefor to their co-tenants. *Coutant v. Catlin*, 2 Sand. Ch. 485, 489 (N. Y.); *Brinckerhoff v. Wemple*, 1 Wend. 470, 473-474 (N. Y.); *Legg v Legg*, 34 Wash. 132; cf. *Harris v. Howes*, 75 Me. 436; *McAllister v. Reel*, 53 Mo. App. 81, 85. See Restatement of the Law on Restitution (1939), sec. 125 and cases cited in the note thereto.

Moreover, both tribes in the 1905 agreement, subsequently ratified by the President in 1906 (R. 41-42), recognized that the Choctaws were under an obligation to make payment to the Chickasaws. The court below also recognized the liability of the Choctaws by ordering them to pay \$16,003.97 to the United States (R. 42). However, instead of settling the case by adjudging that the Choctaws should make payment of \$16,003.97 (one-fourth of the amount received, less the cost of collecting) to the Chickasaws, the court held the United States liable to Chickasaws with a right to recover over against the Choctaws. In so adjudicating a liability of the Choctaw Nation, the court reached the inequitable result of ordering the United States to make payment of \$17,025.50 (one-fourth of the land value), with interest of

\$33,102.77, to the Chickasaws and at the same time ordering the Choctaws to pay to the United States \$16,003.97 (one-fourth of the amount received in 1888, less costs of collecting) without interest. (R. 42). The court below reasoned that inasmuch as the 1906 agreement between the two tribes was never executed by a Choctaw payment to the Chickasaws of their share (\$16,003.97) of the funds awarded the Choctaws by the court below in 1886, the United States could not rely upon it as a settlement (App. 16-17, 19). But the court failed to recognize that the United States had absolved itself of all liability for the taking of the lands by payment in full to one of two co-tenants and that the claim of the Chickasaws against the United States, although couched in terms of a request for payment for a taking, was actually nothing more than a claim against the guardian for not prosecuting the ward's rights against third parties.

It is submitted, therefore, that liability rested primarily upon the Choctaw Tribe and that a direct judgment should have been entered in favor of the Chickasaws against the Choctaws. The statement of the court below (App. 16) that the Government in its cross-complaint requested that if judgment were rendered against it, a judgment in like amount should be given to it against the Choctaws is inaccurate. The Choctaws were made a party to this case under Section 6 of the Juris-

dictional Act,<sup>2</sup> and the Government's cross-complaint asked that any judgment "be made and entered against the Choctaw Nation and not against the United States" (R. 13). The Court of Claims had jurisdiction to render such judgment (*Chickasaw Nation v. United States*, 95 C. Cls. 192, reversed on other grounds, 318 U. S. 423) and should have done so, the Choctaws being primarily liable.

3. If procedural reasons require the United States to make payment to the Chickasaws in the first instance, then it is submitted that the Government is entitled to recover over against the Choctaws the same amount and, more urgently, that no interest should be allowed on the amount payable to the Chickasaws. In its answer, the United States alternatively asked recovery over against the Choctaws in the amount of any judgment in favor of the Chickasaws. The United States paid in full the just compensation required by the Fifth Amendment for the taking when in 1888 it paid \$68,102 to the Choctaws, co-tenants with the Chickasaws (see *supra*, pp. 9-12). Thereafter, if the United States was under any duty toward the Chickasaws, it was merely to fulfill the Gov-

---

<sup>2</sup> Section 6 of the Jurisdictional Act of June 7, 1924, 43 Stat. 537, 538, provides:

"The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy."

ernment's obligation as guardian by seeing to it that the Chickasaws received their share of the payment made to the Choctaws.<sup>3</sup> For delay in effecting the transfer of the Chickasaws' share of the proceeds from the Choctaw fund in the Treasury,<sup>4</sup> neither the Fifth Amendment nor any statute or treaty requires or authorizes the payment of interest. In the absence of such authorization, it is clear that the court below erred in allowing interest to the Chickasaws from February 19, 1906, when the Choctaw-Chickasaw agreement was approved. *Cherokee Nation v. United States*, 270 U. S. 476, 487, 490; R. S. sec. 1091, 28 U. S. C. sec. 284.

4. In the field of Indian law this case is *sui generis*. While the United States regards the questions raised by this cross-petition as having

---

<sup>3</sup> Thus, instead of the recovery of \$17,025.50 allowed by the Court of Claims, the amount of recovery by the Chickasaws should be \$16,003.97, one-fourth of the amount paid to the Choctaws, less the expense of collecting. This is the same amount agreed upon by the tribes in 1905 (R. 41-42) and ordered by the court to be paid by the Choctaws to the United States (R. 42).

<sup>4</sup> At all material times there were Choctaw funds on deposit in the Treasury. Report of Commissioner of Indian Affairs (1888), pp. viii-ix; Report of Commissioner of Indian Affairs (1906), p. 450; Report of Commissioner of Indian Affairs (1920), p. 200. If the transfer of funds could not have been effected by administrative action alone, there was ample authority under Section 18 of the Act of April 26, 1906, 34 Stat. 137, 144, to litigate the Chickasaws' claim against the Choctaws and pay any judgment rendered out of Choctaw funds.

substantial importance, it does not urge that they are of sufficient importance taken alone to justify review, and accordingly it does not desire to press its cross-petition in the event certiorari is denied to the Chickasaw Nation in No. 169. If, on the other hand, certiorari is there granted, we believe that the entire judgment of the Court of Claims, presenting as it does a doubtful interpretation of the interrelationship between the United States and the Indian tribes, should be reviewed.

#### CONCLUSION

For the reasons stated, and on the condition suggested above, it is respectfully submitted that this cross-petition for a writ of certiorari be granted.

HAROLD JUDSON,  
*Acting Solicitor General.*

AUGUST 1945.